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APPLICATION NUMBER	FILING DATE	FIRST NAMED APPLICANT	ATTORNEY DOCKET NO.
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09/241,825 02/01/99 LYTE

M 933.001USR

EXAMINER

HM12/0324

ART UNIT PAPER NUMBER

MARK A LITMAN
SCHWEGMAN LUNDBERG WOESSNER & KLUTH
1600 TCF TOWER
121 SOUTH EIGHTH STREET
MINNEAPOLIS, MN 55402

1651
DATE MAILED:

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03/24/00

This is a communication from the examiner in charge of your application.
COMMISSIONER OF PATENTS AND TRADEMARKS

OFFICE ACTION SUMMARY

Responsive to communication(s) filed on SEPTEMBER 20, 1999.

This action is FINAL.

Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 D.C. 11; 453 O.G. 213.

A shortened statutory period for response to this action is set to expire 1651 month(s), or thirty days, whichever is longer, from the mailing date of this communication. Failure to respond within the period for response will cause the application to become abandoned. (35 U.S.C. § 133). Extensions of time may be obtained under the provisions of 37 CFR 1.136(a).

Disposition of Claims

Claim(s) 1-2 23-42 is/are pending in the application.

Of the above, claim(s) _____ is/are withdrawn from consideration.

Claim(s) 1-2 is/are allowed.

Claim(s) 23-42 is/are rejected.

Claim(s) _____ is/are objected to.

Claims _____ are subject to restriction or election requirement.

Application Papers

See the attached Notice of Draftsperson's Patent Drawing Review, PTO-948.

The drawing(s) filed on _____ is/are objected to by the Examiner.

The proposed drawing correction, filed on _____ is approved disapproved.

The specification is objected to by the Examiner.

The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. § 119

Acknowledgement is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d).

All Some* None of the CERTIFIED copies of the priority documents have been.

received.

received in Application No. (Series Code/Serial Number) _____.

received in this national stage application from the International Bureau (PCT Rule 17.2(a)).

*Certified copies not received: _____

Acknowledgement is made of a claim for domestic priority under 35 U.S.C. § 119(e).

Attachment(s)

- Notice of Reference Cited, PTO-892
- Information Disclosure Statement(s), PTO-1449, Paper No(s). _____
- Interview Summary, PTO-413
- Notice of Draftsperson's Patent Drawing Review, PTO-948
- Notice of Informal Patent Application, PTO-152

- SEE OFFICE ACTION ON THE FOLLOWING PAGES -

Art Unit 1651

1. Receipt is acknowledged of the amendment filed September 20, 1999.
2. Claims 1-2 and 23-42 are now present for examination.
Claims 3-22 have been cancelled.
3. **The prior rejection stands as stated in the previous Office action based on the following:**

**FACTOR I-ABANDONMENT OF CLAIMED SUBJECT MATTER
BASED ON THE INSTANT FILE HISTORY**

The Declaration filed by Applicant, stated on page 9 that:

“It was absolutely clear to me at the time of reviewing the rejections under 35 U.S.C. 102 that the rejections were clearly in error with respect to the inventions which I thought was being claimed at the time. With clear instructions and explanations that I gave the attorney, I still do not understand why the rejection was not argued and readily overcome. It was only upon seeing the actual claims which issued in the LYTE Patent on May 13, 1997 that I became aware of and appreciated the error that there were no claims in the LYTE Patent which covered the important invention of enhancing the growth of bacteria and viruses and harvesting by-products of the bacterial and virus.”

Art Unit 1651

The file history clearly shows that Applicant Lyte had ABANDONED any inventions pertaining to enhancing the growth of bacteria and viruses and harvesting by-products of the bacterial and virus based on the file history of Application Ser. No. 08/266,805 now U.S. Patent 5,629,349 which is the basis for this Reissue Application Ser. No. 09/241,825. The filing date of this application is JUNE 27, 1994. The first action in this Application was a restriction submitted on March 01, 1995 as noted below:

15. Receipt is acknowledged of the preliminary amendments filed June 27, 1994 and the prior art information disclosure statement filed September 23, 1994.
16. Claims 24-28 are present in the instant application.
Claims 1-23 and 29-36 have been cancelled.
17. Restriction to one of the following inventions is required under 35 U.S.C. § 121:
 - I. Claims 24 and 25, drawn to a method of suppressing the growth of **Gram-positive** organisms with an amount of catecholamine, classified in Class 514, subclass 727.
 - II. Claims 26-28, drawn to a method of suppressing the growth of **Gram-negative** organisms by the introduction of an effective blocker of catecholamine receptor sites of the organisms, classified in Class 514, subclass 224.8.
18. The inventions are distinct, each from the other because of the following reasons these inventions have acquired a separate status in the art as shown by their different classification, have acquired a separate status in the art because of their recognized divergent subject matter and the search required for one invention is not required for the other invention, thusly the restriction for examination purposes as indicated is proper.
19. Applicant is advised that the response to this requirement to be complete must include an election of the invention to be examined even though the requirement be traversed.
20. The lengthy specification has not been checked to the extent necessary to determine the presence of all possible minor errors. Applicant's cooperation is requested in correcting any errors of which applicant may become aware in the specification.

Art Unit 1651

21. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Examiner Lilling whose telephone number is (703) 308-2034. Any inquiry of a general nature or relating to the status of this application should be directed to the Group receptionist whose telephone number is (703) 308-0196.

H.J.Lilling: HJL
(703) 308-2034
Art Unit 1808
January 31, 1995

The first action on the merits essentially was only to the rejection of the elected invention and there were no rejections based on prior art:

15. Receipt is acknowledged of the election filed February 10, 1995.
16. Applicant has elected Invention I, claims 24-25.
Claims 26-28 have been withdrawn from consideration.
17. Claims 24-25 are rejected under 35 U.S.C. § 112, first and second paragraphs, as the claimed invention is not described in such full, clear, concise and exact terms as to enable any person skilled in the art to make and use the same, and/or for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

18. The references of record do not anticipate the claimed inventions which includes References R (Qualliotine et al) and S (Denisenko et al)nor do these references suggest the claimed inventions.
19. **No claim is allowed.**
20. The lengthy specification has not been checked to the extent necessary to determine the presence of all possible minor errors. Applicant's cooperation is requested in correcting any errors of which applicant may become aware in the specification.
21. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Examiner Lilling whose telephone number is (703) 308-2034 and fax number (Art Unit 1808) is (703) 308-0294 Any inquiry of a general nature or relating to the status of this application should be directed to the Group receptionist whose telephone number is (703) 308-0196.

H.J.Lilling: HJL
(703) 308-2034

Art Unit 1651

Art Unit 1808

March 21, 1995

The rejections as reviewed by Applicant Lyte were submitted by another Examiner in the parent application on September 13, 1992. During the prosecution of the claims under consideration at that time including generic claims were abandoned due to the rejections by the Examiner. No restrictions were submitted since Applicant did not present any inventions which were restrictable based on the generic claim that was found not to be allowable. Applicant Lyte had effectively abandoned the generic claim in view of the claims submitted in Ser. No. 08/266,805 which were drawn to inventions drawn to methods of suppressing the growth... and no claims were submitted to methods of enhancing the growth....

From September 13, 1992 to May 12, 1997, Applicant Lyte had the opportunity prior to the issue of the patent to submit claims covering "the important invention of enhancing the growth of bacteria and viruses and harvesting by-products of the bacterial and virus.".

Applicant Lyte would have to submit evidence on the record that he did not abandon the claimed subject matter by presenting certified copies of the alleged "clear instructions and explanations that I gave the attorney".

Applicant is entitled within two years from the date of the **original patent**, 35 U.S.C. 251 which presumes diligence, to cover any broadening or narrowing of the claimed inventions pertaining to the allowed claims 1 and 2 of the patent and reissue claims 1 and 2. However, the issue of the claimed subject matter to a **different invention** based on the record involves a lack of diligence on the part of Applicant to submit an application to the different and patentably distinct subject matter. The Reissue provision of 35 U.S.C. 251 does not cover corrections for the lack of diligence and the abandonment of the claimed subject matter which subject matter was not present in the original **patented application** for the alleged generic claims.

Applicant is not within the guidelines of Section 251 that there was an error within meaning of "recapture rule" based on the history and the patented claims under consideration. The failure of Applicant to file claims to the subject matter submitted in the reissue in an earlier application cannot be corrected by the reissue since this failure is not considered an error within the meaning and scope of claiming less than the applicant had a right to claim. Applicants' failure to timely file another application to the claimed subject matter is not considered to be error causing a patent granted on examined claims to be partially inoperative by reason of claiming less than the applicant had a right to claim. Thus, such applicant's error is not correctable by reissue of the original patent under 35 U.S.C. 251.

FACTOR 2-Reissue Applications
DIFFERENT INVENTIONS

Art Unit 1651

New claims 23-42 are drawn to an invention which is not considered to conform to the same general invention as the original patent. That is, claims 23-42 are drawn to patentably distinct inventions. The originally claimed inventions, Claims 1-2, are drawn to a method of “suppressing the growth of... bacteria...”(Claims 3-11) which inventions are directly opposite to Claims 23-42 which are drawn to “enhancing the growth of bacteria..” (Claims 23-31) and “harvesting the by-products of enhance growth of bacteria..”. (Claims 32-42).

In addition, as stated in the previous Office action which has been maintained for the amended claims that there was absolutely no search and examination of any aspect to any methods of enhancing the growth of bacteria which methods are **completely different from the allowed** claimed methods of suppressing the growth of bacteria. In view of the fact that it is well considered in the art that enhancing the growth cannot meet the claimed limitation of suppressing the growth of bacteria, the claims do not generally conform to the general invention as originally elected and allowed in the original patent.

These patentably distinct inventions, (Claims 23-42), would have been restricted along with the other inventions as set forth in the restriction election in the Office action of 31 January 1995, had they been presented at that time for the reasons above. It is not the purpose of reissue to recapture claimed subject matter deliberately canceled in an application to obtain a patent or to claim subject matter that is patentably distinct from the allowed claimed subject matter. It is safe to assume that had claims 23-42 been originally presented, these claims would have been restricted and ultimately canceled prior to issue. Accordingly, claims 23-42 stand withdrawn from further consideration on the merits.

THE REISSUE TO A PATENT

Applicant is entitled to submit claims in a request for Reissue based on claims that were submitted in Application Ser. No. 08/266,806 now U.S. Patent 5,629,349. Applicant is not entitled to the broadening or narrowing of claimed subject matter that were submitted and prosecuted in the grandfather application(s). The decisions pertaining to reissue does not cover the claimed subject matter of the grandfather application Ser. No. 07/847,196 filed March 06, 1992 which was abandoned. Applicant arguments and amendments must be drawn to the claimed subject matter that was under consideration for the claims submitted for examination at the time that this Examiner had first examined Application Ser. No. 08/266,805, now U.S. Patent 5,629,349 for which the reissue has been submitted to the PTO. Applicant allegations and arguments have been deemed not to be persuasive in view of the fact that the claimed subject matter is considered to be drawn to a different invention that would have been restricted if the claimed subject matter was submitted at the time of the first examination by this Examiner.

Art Unit 1651

An error of law is not excluded from the class of error subject to correction in accordance with the reissue statute. Although attorney error is not an open invitation to reissue in every case in which it may appear, see **In re Weiler**, 790 F.2d 1576, 1579, 229 USPQ 673, 675 (Fed. Cir. 1986) ("not every event or circumstance that might be labeled 'error' is correctable by reissue"), the purpose of the reissue statute is to avoid forfeiture of substantive rights due to error made without intent to deceive.

The law does not require that no competent attorney or alert inventor could have avoided the error sought to be corrected by reissue. Failure of the attorney to claim the invention sufficiently broadly is "one of the most common sources of defects". **In re Wilder**, 736 F.2d 1516, 222 USPQ 369 (Fed. Cir. 1984), cert. denied, 469 U.S. 1209 (1985):

Subjective intent is not determinative of whether the applicants erred in claiming less than they had a right to claim. **In re Mead**, 581 F.2d 251, 255, 198 USPQ 412, 416 (CCPA 1978). "Intent to claim" is not the criterion for reissue, and has been well described as "but judicial shorthand, signifying a means of measuring whether the statutorily required error is present." **In re Weiler**, 790 F.2d 1576, 1581, 229 USPQ 673, 676 (Fed. Cir. 1986) (emphasis in original). The statutory standard of reissuable error is objective, and does not require proof of subjective state of mind:

**LACK OF INTENT TO CLAIM THE SPECIES NOW
CLAIMED IN THE REISSUE**

In accordance with the M.P.E.P., Claims 23-42 are rejected under §251 as containing claims to different inventions that were not submitted in the original patent, U.S. 5,629, 349.

Art Unit 1651

In Section 1450 Restriction and Election of Species states:

“The examiner may not require restriction in a reissue application (37 CFR 1.176 and MPEP § 1440).

Even where the original patent contains claims to different inventions which the examiner considers independent and distinct, and the reissue application claims the same inventions, the examiner should not require restriction between them or take any other action with respect to the question of plural inventions. Restriction may only be requested by the applicant (37 CFR 1.177 and MPEP § 1451). In situations where a reissue applicant presents claims for the first time that are distinct and separate from the claims of the patent, the examiner must follow the practice resulting from *In re Amos*, 953 F.2d 613, 618, 21 USPQ2d 1271, 1274 (Fed. Cir. 1991) as set forth in MPEP § 1412.01.

A reissue applicant's failure to timely file a divisional application is not considered to be error causing a patent granted on elected claims to be partially inoperative by reason of claiming less than the applicant had a right to claim. Thus, such error is not correctable by reissue of the original patent under 35 U.S.C. 251. *In re Watkinson*, 900 F.2d 230, 14 USPQ2d 1407 (Fed. Cir. 1990); *In re Orita*, 550 F.2d 1277, 1280, 193 USPQ 145, 148 (CCPA 1977). See also *In re Mead*, 581 F.2d 251, 198 USPQ 412 (CCPA 1978).”

Likewise, if the original patent specification shows an intent not to claim the newly presented invention, that invention cannot be added by reissue. In these situations, the reissue claims should be rejected under 35 U.S.C. 251 for lack of defect in the original patent and lack of error in obtaining the original patent. See also MPEP § 1412.01.

When the original patent contains claims to a plurality of species and the reissue application contains claims to the same species, election of species should not be required even though there is no allowable generic claim. If the reissue application presents claims to species not claimed in the original patent, election of species should not be required, but the added claims may be rejected, where appropriate, for lack of defect in the original patent and lack of error in obtaining the original patent as discussed above.”

Response to the remarks by Applicant submitted on September 20,1999.

The previous Office action of June 25, 1999 is proper and has been maintained for the reasons submitted above.

1. Page 4-Statement: “It was understood by Counsel that the position expressed by the Examiner was that claims could be amended in a broadening Reissue but that entirely new claims could not be submitted.”

Examiner never indicated this statement as stated above and Applicant is incorrect since Applicant is entitled to all claimed rights in accordance with Section 251. This right includes all

Art Unit 1651

claims that may be broader or narrowed by reason of the patentee claiming more or less than he had a right to claim in the patent in accordance with the new and amended application. It is noted that this Examiner would consider e.g.,

all amendments to the original process claims pertaining to the same general invention for the allowed subject matter of Claim(s) 1 (and 2):

“A method of suppressing the growth of Gram-positive bacteria in a host medium, said host medium being selected from the group consisting of in vitro and cell cultures, said method comprising the introduction of an effective amount of a catecholamine to the host medium to act directly on the growth of Gram-positive bacteria.”

As long as the amended claim(s) is(are) essentially to the same general invention, Applicant is entitled to narrow or broaden the allowable process claim(s) by the addition or elimination of any subject matter which does not effect the inventive concept of the allowable process of suppressing the growth of the Gram-positive bacteria by the effective amount of the catecholamine.

2. Page 5-Statement #2. Applicant is correct in the statement that the claimed inventions were for a different invention.

3. Page 5-Statement #3. Applicant is incorrect in this statement since Applicant is entitled to all rights in accordance with Section 251 for Reissues.

Applicant is entitled to the following as indicated in M.P.E.P. 1412.03 Broadening Reissue Claims:

A broadened reissue claim is a claim which enlarges the scope of the claims of the patent, i.e., a claim which is greater in scope than each and every claim of the patent. A claim of a reissue application enlarges the scope of the claims of the patent if it is broader in at least one respect, even though it may be narrower in other respects.

A claim in the reissue which includes subject matter not covered by the patent claims enlarges the scope of the patent claims. For example, if any amended or newly added claim in the reissue contains within its scope any conceivable apparatus or process which would not have infringed the patent, then that reissue claim would be broader than the patent claims. *Tillotson, Ltd. v. Walbro Corp.*, 831 F.2d 1033, 1037 n.2, 4 USPQ2d 1450, 1453 n.2 (Fed. Cir. 1987); *In re Ruth*, 278 F.2d 729, 730, 126 USPQ 155, 156 (CCPA 1960); *In re Rogoff*, 261 F.2d 601, 603, 120 USPQ 185, 186 (CCPA 1958). A claim which reads on something which the original claims do not is a broadened claim. A claim would be considered a broadening claim if the patent owner would be able to sue any party for direct infringement who previously could not have been sued for direct infringement.

Art Unit 1651

However, the claims must comply with the following:

1412.01 Reissue Claims Must Be for Same General Invention

The reissue claims must be for the same invention as that disclosed as being the invention in the original patent, as required by 35 U.S.C. 251. This does not mean that the invention claimed in the reissue must have been claimed in the original patent, although this is evidence that applicants considered it their invention. The entire disclosure, not just the claim(s), is considered in determining what the patentee objectively intended as his or her invention. The proper test as to whether reissue claims are for the same invention as that disclosed as being the invention in the original patent is “an essentially factual inquiry confined to the objective intent manifested by the original patent.” *In re Amos*, 953 F.2d 613, 618, 21 USPQ2d 1271, 1274 (Fed. Cir. 1991) (quoting *In re Rowand*, 526 F.2d 558, 560, 187 USPQ 487, 489 (CCPA 1975)) (emphasis added). See also *In re Mead*, 581 F.2d 257, 198 USPQ 412 (CCPA 1978). The “original patent” requirement of 35 U.S.C. 251 must be understood in light of *In re Amos*, *supra*, where the Court of Appeals for the Federal Circuit stated

We conclude that, under both Mead and Rowand, a claim submitted in reissue may be rejected under the “original patent” clause if the original specification demonstrates, to one skilled in the art, an absence of disclosure sufficient to indicate that a patentee could have claimed the subject matter.

Merely finding that the subject matter was “not originally claimed, not an object of the original patent, and not depicted in the drawing,” does not answer the essential inquiry under the “original patent” clause of § 251, which is whether one skilled in the art, reading the specification, would identify the subject matter of the new claims as invented and disclosed by the patentees. In short, the absence of an “intent,” even if objectively evident from the earlier claims, the drawings, or the original objects of the invention is simply not enough to establish that the new claims are not drawn to the invention disclosed in the original patent.

The cursory search and citation of patents by Applicant have been deemed not to be persuasive in view of the above legal decisions pertaining to Applicant’s rights to Reissues.

The prosecution history clearly indicates that Applicant had no intent for claiming the subject matter which subject matter has been submitted for the first time for “enhancing” in the file history of the original patent U.S. 3, 629,349, which error cannot be cured by a reissue under Section 251. Applicant has argued allegations pertaining to subject matter not claimed in the original patent but subject matter that was surrendered or abandoned in view of the file history. The surrounding or abandonment of the subject matter involved exceptionally very broad

Art Unit 1651

language which was in essence claiming the world of any living organisms and that the exceptionally broad claims were rejected by the Examiner (different Examiner in great grandfather and grandfather applications). Applicant had acquiesced to the rejection by submitting claims drawn to only "suppressing specific Gram-positive bacteria" which claimed subject matter was found allowable. Applicant had sufficient time to submit any additional subject matter prior including the claimed subject matter from 1992 to 1997 according to the alleged error by Applicant. It has been considered that there is nothing in the original patent U.S. 3,639,349, evidencing that Applicant intended to claim a method for "enhancing the growth of bacteria.." or that applicant considered the methods now claimed to be their invention and therefore there was no error within the meaning of Section 251.

Page 10 of Remarks

Applicant is correct that no restriction was not submitted between the two opposite and patentably distinct process conditions of "suppressing" and "enhancing" since no claims were submitted to these different mechanisms. The generic claims alleged to support the claims under consideration for the Reissue were rejected not in the original patent but in parent(s) based on three different rejections which Applicant had acquiesced for the exceptionally broad claimed subject matter for the claims submitted in the application containing only one embodiment in which there was no generic claim submitted to "enhancing or enhancement....". The application filed June 27, 1994 did not contain any generic claim as alleged nor any claims to the enhancement of bacteria. **Applicant is not entitled based on the case history to now file claims to a different invention based on Section 251.**

Applicant is not entitled to any recapture of claimed subject matter cancelled in other patents applications which claimed subject matter was not in the original patent application, as in M.P.E.P. 1412.02 Recapture of Canceled Subject Matter:

A reissue will not be granted to "recapture" claimed subject matter deliberately canceled in an application to obtain a patent. Claims 23-42 would have been rejected under 35 U.S.C. 251 as being an improper recapture of broadened claimed subject matter surrendered in the application for the patent upon which the present reissue is based if the claims were in the original patented application and the same rejections were submitted which claims were cancelled to obtain the patent claims based on Claims 1 and 2 in the instant reissue application. See *Hester Industries, Inc. v. Stein, Inc.*, 142 F.3d 1472, 46 USPQ2d 1641 (Fed. Cir. 1998); *In re Clement*, 131 F.3d 1464, 45 USPQ2d 1161 (Fed. Cir. 1997); *Ball Corp. v. United States*, 729 F.2d 1429, 1436, 221 USPQ 289, 295 (Fed. Cir. 1984).

According to the M.P.E.P. 1402 the "Grounds for Filing":

A reissue application is filed to correct an error in the patent which was made without any deceptive intention, where, as a result of the error, the patent is deemed wholly or partly inoperative or invalid. An error in the patent arises out of an error in conduct which was made in the preparation and/or prosecution of the application which became the patent. There must be at least one error in the patent

Art Unit 1651

to provide grounds for reissue of the patent. If there is no error in the patent, the patent will not be reissued. The present section provides a discussion of what may be considered an error in the patent upon which to base a reissue application.

Even if one accepts Applicant's arguments with respect to the broadening aspect present in the reissue which was not present in the application for patent, Applicant is not entitled to a reissue based on the alleged error. The record of the application for the patent shows that the broadening aspect (in the reissue) relates to **subject matter that applicant previously surrendered during the prosecution of the parent application**. Accordingly, the narrow scope of the claims in the patent was not an error within the meaning of 35 U.S.C. 251, and the broader scope surrendered in the application for the patent cannot be recaptured by the filing of the present reissue application.

In addition, Applicant's failure to timely file claims drawn to an embodiment not claimed in the original patent is not considered to be error causing a patent granted on other claimed embodiments to be partially inoperative by reason of claiming less than the applicant has a right to claim. Thus, such applicant's error is not correctable by reissue of the original patent under 35 U.S.C.

4. Claims 1-2 stand allowed.
Claims 23-42 stand rejected.

5. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

6. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Examiner Lilling whose telephone number is (703) 308-2034 and fax number (Art Unit 1651) is (703) 305-7939 or SPE Michael Wityshyn whose telephone number is (703) 308-4743. Any inquiry of a general nature or relating to the status of this application should be directed to the Group receptionist whose telephone number is (703) 308-0196.

H.J.Lilling: HJL
(703) 308-2034
Art Unit 1651
March 14, 2000

Herbert J. Lilling
HERBERT J. LILLING
PATENT EXAMINER
GROUP 1600 ART UNIT 1651